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KHAIRUDDIN ABU HASSAN v. TAN SRI MOHAMED APANDI ALI

HIGH COURT MALAYA, KUALA LUMPUR
HANIPAH FARIKULLAH J
[JUDICIAL REVIEW NO: WA-25-27-02-2016]
B 14 FEBRUARY 2017

CIVIL PROCEDURE: *Judicial review – Application for – Decisions made by Attorney General ('AG') regarding Malaysian Anti Corruption Commission ('MACC') investigation papers related to complaints against Prime Minister –*
C *Whether AG's decision not to institute criminal proceedings under art. 145(3) of Federal Constitution amenable to judicial review – Whether there was conflict of interest – Whether AG's decision to close files upon investigation ultra vires AG's powers under art. 145(3) of Federal Constitution – Whether correct test applied in decision to refuse MACC's request for mutual legal assistance – Whether setting up*
D *of Royal Commission of Inquiry involved policy consideration by Federal Government – Whether non-justiciable – Jurisprudence of court – Whether court could tell public authority how to exercise powers – Whether application ought to be dismissed*

The applicant applied for leave for judicial review pursuant to the decisions
E made by the Attorney General ('ÁG') appearing in a press release ('the press release'). The decisions were made pursuant to the submission of three investigation papers by the Malaysian Anti-Corruption Commission ('MACC') to the AG for his decision. The applicant contended that the MACC investigation papers related to complaints against the Prime Minister
F ('PM') in respect of (i) RM2.6 billion that was transferred to the PM's personal accounts (first investigation paper); (ii) the Government guaranteed a RM4 billion loan to SCR International by Kumpulan Wang Persaraan approved in a Cabinet Meeting (second investigation paper); and (iii) monies transferred to the PM's personal accounts from the accounts of SRC
G International (third investigation paper). In the press release, the AG stated that he had thoroughly perused the said investigation papers which contained evidence from witnesses and supporting documents and was, *inter alia,* satisfied that (i) the RM2.6 billion was a personal donation to the PM from the Saudi Royal family; (ii) there was no evidence to show any criminal
H offence had been committed in relation to the said donation, thus there was no necessity for Malaysia to make a request for a mutual legal assistance from any foreign State; and (iii) the PM had not abused his position. The issues that arose herein were (i) whether the decision of the AG not to institute criminal proceedings under art. 145(3) of the Federal Constitution ('Constitution') was not amenable to judicial review or not-justiciable;
I (ii) whether the AG was in a conflict of interest to decide whether to charge or not to charge the Prime Minister on the 1MDB and its related cases; (iii) whether the decision of the AG directing the MACC to close its files

upon the investigation into the alleged offences committed by the PM was *ultra vires* the AG's powers under art. 145(3) of the Constitution; (iv) whether the AG had failed to apply the correct test in arriving at his decision to refuse MACC's request for mutual legal assistance; and (v) whether a Royal Commission of Inquiry should be formed and convened to advise the appropriate actions to be taken on the MACC investigation papers.

Held (dismissing application):

(1) The effect and meaning of art. 145(3) of the Constitution has been settled by a long line of decisions of the apex court and these courts have held that the decision of the AG to institute or not to institute criminal proceedings was not justiciable or amenable to judicial review. Article 145(3) of the Constitution is a special provision which gives only the AG the power to institute, conduct or discontinue any proceeding for an offence (other than proceedings before a Syariah Court, a native court or a court martial). Article 145(3) gives the AG a very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts could not compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue. Therefore, the issue of conflict of interest did not arise when the AG in this case decided not to charge the PM. (paras 24-31)

(2) The instruction of NFA/KUS ('no further action' and 'kemas untuk simpanan') had nothing to do with the exercise of the AG's discretion under art. 145(3). It merely relates to the instructions commonly minute in the investigation papers after a decision not to prosecute is made. The minutes of NFA/KUS in the investigation papers did not impede the MACC to re-open investigations on new evidence. There was no encroachment on the investigation powers of the MACC under the MACC Act. The applicant was not challenging the validity of s. 29 of the MACC Act particularly with regards to the status of the MACC papers which by operation of law is classified as secret. Thus, the proviso to s. 29(4) was not applicable to the facts herein. There was no merit in the applicant's contention that the decision of the AG directing the MACC to close its files upon the investigation into offences committed by the PM was *ultra vires* the AG's powers under art. 145(3) of the Constitution. (paras 37-49)

(3) The AG stated that on the evidence of witnesses and supporting documents produced in the investigation papers, there was no offence disclosed. In light of the Federal Court decision in *Empayar Canggih Sdn Bhd v. Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna*, the AG's exercise of power under

A s. 8(2) of the Mutual Assistance in Criminal Matters Act 2002 (MACMA) was in the course of a criminal investigation and hence was not reviewable by the court. (paras 55 & 56)

(4) The setting up of a Commission of Enquiry involves a policy consideration by the Federal Government. The Government policies
B emanate after consideration of a number of technical factors which are often non-legal; and judges do not possess the necessary information and expertise to evaluate these non-legal factors and to pass judgment on the appropriateness or adequacy of a particular policy. The relief and the subject matter presented by the applicant with regards to the setting up
C for a Royal Commission in this case involved a policy consideration by the respondent and hence was non-justiciable. The jurisprudence of the court is that it is not for the court to interfere in the matter because the wisdom and policy of the Government belongs to the Government. The court could not tell the public authority how to exercise its powers.
D There was thus no purpose for this court to grant leave just for the purpose of investigation on full *inter parte* basis as there was no arguable case in respect of the applicant's application. (paras 62-67)

Case(s) referred to:

DPP v. Humphrys [1976] 2 All ER 497 ***(refd)***

E *Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia [2013] 2 CLJ 1009 FC* ***(refd)***

Empayar Canggih Sdn Bhd v. Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna (Rayuan Sivil No. 01(f) 21-09-2012(W)) (Unreported) ***(refd)***

Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1
F *CLJ (Rep) 63 SC* ***(refd)***

Johnson Tan Han Seng v. PP & Other Appeals [1977] 1 LNS 38 FC ***(refd)***

Karpal Singh & Anor v. PP [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 SC ***(refd)***

Law Society of Singapore v. Phyllis Tan [2008] 2 SLR 239 ***(refd)***

Long Samat & Ors v. PP [1974] 1 LNS 80 FC ***(foll)***

Mohd Rafizi Ramli v. PP [2014] 4 CLJ 1 CA ***(refd)***

G *Mohd Zulhazi Mohd Zulkafli v. Suruhanjaya Pasukan Polis Diraja Malaysia & Anor [2014] 1 LNS 574 CA* ***(refd)***

PP v. Zainuddin Sulaiman & Ors [1986] 1 CLJ 468; [1986] CLJ (Rep) 232 SC ***(refd)***

R v. Director of Public Prosecutions, ex parte C [1995] 1 QBD 136 ***(refd)***

Regina v. Director of Public Prosecutions, Ex parte Manning and Another [2001] QB 330

Repco Holdings Bhd v. PP [1997] 4 CLJ 740 HC ***(refd)***

H *Suruhanjaya Sekuriti v. Datuk Ishak Ismail [2016] 3 CLJ 19 FC* ***(refd)***

Teh Cheng Poh v. PP [1978] 1 LNS 202 PC ***(foll)***

Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd [1995] 3 CLJ 627 SC ***(refd)***

WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

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Legislation referred to:
Commissions of Enquiry Act 1950, s. 2
Federal Constitution, arts. 8(1), 40(1), 145(3)
Malaysian Anti-Corruption Commission Act 2009, ss. 3, 16, 29(4), 50
Mutual Assistance In Criminal Matters Act 2002, ss. 2, 8(2)
Rules of Court 2012, O. 53 r. 3(2)

For the applicant - Mohamed Haniff Khatri Abdulla; M/s Haniff Khatri
For the respondent - Amarjeet Singh Serjit Singh & Awang Armadajaya Awang Mahmud; SFCs

Reported by Suhainah Wahiduddin

JUDGMENT

Hanipah Farikullah J:

Introduction

[1] The applicant applied for leave for judicial review pursuant to the decisions made by the Attorney-General ("AG") appearing in a press release issued on 26 January 2016 ("the press release"). The decisions were made pursuant to the submission of three investigation papers by the Malaysian Anti-Corruption Commission ("MACC") to the AG for his decision.

Brief Facts

[2] The applicant contended that the MACC investigation papers relate to complaints against the Prime Minister ("PM") in respect of:

(i) RM2.6 billion that was transferred to the PM's personal accounts (first investigation paper).

(ii) The Government guaranteed a RM4 billion loan to SRC International by Kumpulan Wang Persaraan approved in a Cabinet Meeting (second investigation paper).

(iii) Monies transferred to the PM's personal accounts from the accounts of SRC International (third investigation paper).

[3] Let me first set the context of certain public statements made by the respondent upon which the applicant seek to rely. In the press release, the AG stated that he had thoroughly perused the said investigation papers which contained evidence from witnesses and supporting documents and:

(i) was satisfied that the RM2.6 billion was a personal donation to the PM from the Saudi Royal family and was satisfied:

(a) that there was no evidence to show that any criminal offence had been committed in relation to the said donation; and

(b) that since no criminal offence has been committed there was no necessity for Malaysia to make a request for a mutual legal assistance from any foreign State.

(ii) that in respect of the second investigation paper that there was no evidence to show that the PM had abused his position during the Cabinet Meeting which approved the government guarantee of RM4 billion in favour of SRC International; and

(iii) that in respect of the third investigation paper that there was no evidence to show that the PM had committed any criminal offence.

Reliefs

[4] The reliefs sought in the judicial review in the application read as follows:

(a) suatu perintah *certiorari* untuk membatalkan keputusan yang dibuat oleh Responden pada 26.1.2016 yang memutuskan bahawa tiada keperluan bagi Malaysia untuk membuat permintaan bantuan bersama dalam perkara jenayah (mutual legal assistance) kepada mana-mana negara asing serta bahawa tiada apa-apa kesalahan jenayah yang dilakukan oleh Perdana Menteri Najib Abdul Razak ("Najib Razak") berkait tiga kertas siasatan oleh Suruhanjaya Pencegahan Rasuah Malaysia dengan arahan supaya ketiga-tiga kertas siasatan tersebut ditutup:

(i) kertas siasatan berkaitan dana yang dikatakan berjumlah RM2.6 billion yang dimasukkan ke dalam akaun Najib Razak;

(ii) kertas siasatan berkaitan dakwaan salah guna kuasa oleh Najib Razak semasa mesyuarat Jemaah Menteri yang memberi kelulusan jaminan kepada wang pinjaman RM4 billion oleh syarikat SRC International daripada Kumpulan Wang Persaraan;

(iii) kertas siasatan berkaitan kemasukan sejumlah wang daripada akaun SRC International ke dalam beberapa akaun peribadi Najib Razak; dan

(b) Suatu perintah *mandamus* bahawa suatu suruhanjaya siasatan khas ditubuhkan untuk mengkaji, mempertimbang dan seterusnya menentukan tindakan lanjut yang sewajarnya terhadap hasil tiga kertas siasatan Suruhanjaya Pencegahan Rasuah yang dirujuk dalam perenggan 2(a), (b) dan (c) di atas.

(c) Kos permohonan ini dan kos sampingan baginya dibayar oleh Responden; dan

(d) Lain-lain relief yang difikirkan wajar dan adil oleh Mahkamah yang Mulia ini.

[5] The applicant, in essence, submitted the following grounds in the statement required by O. 53 r. 3(2) of the Rules of Court 2012 to challenge the said decisions:

(i) the AG was in a position of conflict of interest to determine whether the Prime Minister had committed any offence as it was on the Prime Minister's advice that he was appointed as the AG. He also queried whether the AG's appointment as a director of Tabung Haji had anything to do with the said decisions.

(ii) the decision in respect of the RM2.6 billion case is unreasonable as the AG:

(a) failed to consider that a *prima facie* case for an offence under s. 3 read with ss. 16 and 50 of the MACC Act had been established based on the fact that the monies had been transferred to the Prime Minister's accounts;

(b) took into account an irrelevant consideration the return of RM2.03 billion of the said monies which is a defence to be raised by the Prime Minister at the trial;

(c) failed to consider that the request for mutual legal assistance was to verify that the monies came from the Saudi Royal family and the Saudi Treasury moreover part of the monies were returned to the said family.

(iii) the AG by considering a defence to be raised by an accused and denying the request for mutual legal assistance had acted in excess of his jurisdiction under art. 145(3).

(iv) the decisions in respect of the two investigation papers concerning SRC International is unreasonable as the AG:

(a) failed to consider whether the approval given for the Government guarantee on the RM4 billion loan was given in consideration of the monies transferred to the Prime Minister's personal accounts; and

(b) considered possible defences open to the Prime Minister which is not his function under art. 145(3).

(v) the AG's instructions to close the investigations papers:

(a) exceeded his jurisdiction under art. 145(3); and

(b) was unreasonable as the AG ought to have waited for the results of the investigations into 1MDB by the Office of the Attorney General of Switzerland who had requested for mutual legal assistance in respect of its investigations.

Whether The Decision Of The AG Not to Institute Criminal Proceedings Under art. 145(3) Is Not Amenable To Judicial Review Or Not-Justiciable

[6] The first point that I will deal with is the Senior Federal Counsel's principal contention that the decision of the AG not to institute criminal proceedings under art. 145(3) of the Federal Constitution is non-justiciable

and hence is not reviewable by the court. As such, the learned Senior Federal Counsel submitted that this application is an abuse of the court process and should be dismissed.

[7] Article 145(3) of the Federal Constitution provides as follows:

> 145. Attorney General
>
> ...
>
> (3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial

[8] I will begin with the Federal Court case of *Long bin Samat & Ors v. PP* [1974] 1 LNS 80; [1974] 2 MLJ 152 which held as follows:

> (i) In our view, this clause (Article 145(3) from the supreme law clearly gives the Attorney General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue.
>
> (ii) Anyone who is dissatisfied with the Attorney General's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, should seek his remedy elsewhere, but not in the courts.

[9] In *Johnson Tan Han Seng v. PP & Other Appeals* [1977] 1 LNS 38; [1977] 2 MLJ 66, the Federal Court was asked to determine whether the AG may discriminate between persons charged for the possession of firearms under different statutes carrying different sentences. The Federal Court followed the interpretation of art. 145(3) in *Long Samat v. PP (supra)* and further held that art. 8(1) is to be read subject to art. 145(3) in the following words:

> (i) As s. 376 of the Criminal Procedure Code was already in existence before Merdeka, our constitution-makers could have been content with relying on it alone to preserve after Merdeka the Attorney-General's pre-Merdeka power, and if they had done so then it might be arguable that after Merdeka it must be read subject to art. 8; but our constitution- makers were not content to do so. They deliberately wrote art. 145(3) into our constitution ... In view of the deliberate decision of our constitution-makers to write this provision into our constitution, I do not think that it can be said that it must be read subject to art. 8. Rather, in my view, the contrary: art. 8 it is that must be read subject to art. 145(3).

(ii) In deciding that the Attorney-General is not constrained by art. 8 when deciding whether or not to prosecute and if so on what charge, whether a lesser or a greater one, it must not be thought that he may dishonestly. The public of whose interest he is the guardian has a right to expect him to act honestly, without fear of powerful national and local figures or of the consequences to him personally or politically, and without favoring his relatives and friends and supporters, his principal concern being to maintain the rule of law so that there will be no anarchy and to maintain standards in public life and the private sector; and if he did not do his duty honestly and properly the public would be able to show their disapproval not however in the courts but elsewhere and in the last resort by voting against the party of which he is a member.

[10] The Privy Council in *Teh Cheng Poh v. PP* [1978] 1 LNS 202; [1979] 1 MLJ 50 upheld the interpretation of art. 145(3) by the Federal Court in the following words:

(i) It was contended on behalf of the appellant that the exercise of this discretion by the Attorney General deprived the appellant of his right under art. 8(1) of the Constitution to equality before the law ... Their Lordships agree with the Federal Court in rejecting the contention. Under the common law system of administration of criminal justice a prosecuting authority has a discretion whether to institute proceedings at all and, if so, with what offence to charge the accused. Such a discretion is conferred upon the Attorney General of Malaysia by art. 145(3) of the Constitution.

(ii) There are many factors which a prosecuting authority may properly take into account in exercising its discretion as to whether to charge a person at all, or, where the information available to it discloses the ingredients of a greater as well as a lesser offence, as to whether to charge the accused with the greater or the lesser. The existence of those factors to which the prosecuting authority may properly have regard and the relative weight to be attached to each of them may vary enormously between one case and another. All that equality before the law requires, is that the cases of all potential defendants to criminal charges shall be given unbiased consideration by the prosecuting authority and that decisions whether or not to prosecute in a particular case for a particular offence should not be dictated by some irrelevant consideration.

[11] I have carefully read the Privy Council decision in *Teh Cheng Poh*, and in my view the *ratio decidendi* of *Teh Cheng Poh* is that the AG by virtue of art. 145(3) "has a discretion whether to institute proceedings at all and, if so, with what offence to charge the accused" and as such art. 8(1) was construed as being subject to art. 145(3).

[12] The High Court in *Repco Holdings Bhd v. Public Prosecutor* [1997] 4 CLJ 740; [1997] 3 MLJ 681 summed up the decisions of *Long bin Samat* and *Johnson Tan* as follows:

A (i) The importance of the propositions formulated by the learned Lord President in these two cases is that, as a matter of public law, the exercise of discretion by the Attorney General in the context of art. 145(3) is put beyond judicial review. In other words, the exercise by the Attorney General of his discretion, in one way or another, under art. 145(3), cannot be questioned in the courts by way of
B *certiorari*, declaration or other judicial review proceedings.

(ii) I think that the proposition is not only good law but good policy. For, were it otherwise, upon each occasion that the Attorney General decides not to institute or conduct or discontinue a particular criminal proceeding, he will be called upon to a court of
C law the reasons for his decision. It will then be the court and not the Attorney General who will be exercising the power under art. 145(3). That was surely not the intent on our founding fathers who framed our Constitution for us.

[13] In *Public Prosecutor v. Zainuddin Sulaiman & Ors* [1986] 1 CLJ 468; D [1986] CLJ (Rep) 232; [1986] 2 MLJ 100, the Supreme Court held that the AG's decision is not open to judicial review. The position was stated as follows:

(i) The law and Constitution in giving the Attorney-General an exclusive power respecting direction and control over criminal matters expect him
E to exercise it honestly and professionally. The law gives him a complete trust in that the exercise of this power is his and his alone and that his decision is not open to any judicial review.

(ii) If he is a Minister of the Government he is answerable to Parliament and to his cabinet colleagues, and if he is not, the Government will answer
F for him in Parliament, whilst he himself will be answerable to the Government, and if he is a civil servant he will be answerable also to the Judicial and Legal Service Commission.

[14] In *Karpal Singh & Anor v. Public Prosecutor* [1991] 2 CLJ 1458; [1991] G 1 CLJ (Rep) 183; [1991] 2 MLJ 544, the Supreme Court reiterated the law on art. 145(3) as follows:

Unlike UK, the Constitution of the Federation which is a written law is specifically declared to be the supreme law of the land. For our immediate purpose we wish to refer to art. 145(3) of the Constitution which states that ... The discretion vested in the Attorney General is unfettered and
H cannot be challenged and substituted by that of the court's. The reasoning and logic behind such contention is well illustrated in the cases of *PP v. Lee Tin Bau* [1985] 1 MLJ 388, *Long bin Samat & Ors v. PP* [1974] 2 MLJ 152, *PP v. Datuk Harun bin Haji Idris and Ors* [1976] 2 MLJ 116 and *Poh Cho Ching v. PP* [1982] 1 MLJ 86. In the circumstances, it is superfluous to reiterate the same points.
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[15] In *Mohd Rafizi Ramli v. PP* [2014] 4 CLJ 1; [2014] 3 MLJ 114, the Court of Appeal held that the courts ought to refrain from inquiring into the AG's exercise of discretion under art. 145(3) following *DPP v. Humphrys* [1976] 2 All ER 497 where it was said:

> A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.

[16] Learned counsel for the applicant relied on the principles in *Sri Lempah Enterprise Sdn Bhd*'s case to support its contention that the exercise of discretionary power by the AG is amenable to judicial review.

[17] It must be emphasised that *Sri Lempah* is not decided by the apex court in the context of art. 145(3) of the Federal Constitution. I agreed with learned Senior Federal Counsel's argument that *Sri Lempah* has no bearing on the interpretation of art. 145(3). In any event, cases such as *Zainuddin, Karpal Singh* and *Repco* which are cases on art. 145(3) were all decided after *Sri Lempah Enterprise.*

[18] It was also contended by the applicant that the Singapore case, *Law Society of Singapore v. Phyllis Tan* [2008] 2 SLR 239 is an authority for the proposition that based on *Teh Cheng Poh*'s case, the AG's discretions could be challenged if the first respondent had exercised his discretion unlawfully.

[19] Learned Senior Federal Counsel in my view correctly argued that the case of *Phyllis Tan* expressed the position between the judicial power of the courts and the prosecutorial power of the AG, as follows:

> [144] Article 93 of the Federal Constitution provides that:
>
> The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force.
>
> But, separately, Art 35(8) provides that: The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence.
>
> These two provisions expressly separate the prosecutorial function from the judicial function, and give equal status to both functions. Hence, both organs have an equal status under the Constitution, and neither may interfere with each other's functions or intrude into the powers of the other, subject only to the constitutional power of the court to prevent the prosecutorial power from being exercised unconstitutionally. Indeed, this is not even a true "interference" in as much as the exercise of a function unconstitutionally is, in effect, not an exercise of that function at all and which it is therefore the duty of the court (pursuant to the constitution itself) to prevent.

A [145] In relation to public prosecutions, Art 35(8) makes it clear that the institution, conduct or discontinuance of any criminal proceedings is a matter for only the Attorney-General to decide. This means that, except for unconstitutionality, the Attorney-General has an unfettered discretion as to when and how he exercises his prosecutorial powers. This also means that it is improper for the court to prevent the Attorney-General B from prosecuting an offender by staying the prosecution.

[20] Learned counsel for the applicant also argued that Commonwealth decisions show that a decision not to prosecute in those jurisdictions is subject to judicial review.

C **[21]** In my view, the common law principle in *R. v. Director of Public Prosecutions, ex parte C* [1995] 1 QBD 136 and *Regina v. Director of Public Prosecutions, Ex parte Manning and another* [2001] QB 330 cited by the applicant do not apply in Malaysia as it is based on legislation the Code for Crown prosecutors which is peculiar to England. In the circumstances, the D said common law cases are not relevant or applicable in the Malaysian context which is governed by art. 145(3).

[22] It must be noted that the Federal Court in *Johnson Tan*'s case had also considered the Indian position and held as follows:

E The corresponding article 76 of the Indian constitution dealing with the Attorney General in India does not contain a similar provision, merely providing by clauses (2) and (3) that:

(2) It shall be the duty of the Attorney General to give advice to the Government of India upon such legal matters, and to perform such other duties of a legal character, as may from time to time be F referred or assigned to him by the President, and to discharge the functions conferred on him by or under this constitution or any other law for the time being in force.

(3) In the performance of his duties the Attorney General shall have right of audience in all courts in the territory of India.

G **[23]** It is pertinent to note that Indian decisions do not apply in Malaysia. There is no similar provision as our art. 145(3).

[24] I have analysed the authorities submitted by both parties and in my view, the effect and meaning of art. 145(3) has been settled by a long line of decisions of the apex courts. These courts have held that the decision of H the AG to institute or not to institute criminal proceedings is not justiciable or amenable to judicial review.

[25] In *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; [2012] 4 MLJ 296 the Federal Court reiterated as follows:

I Leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favor of granting the reliefs sought at the substantive hearing may be the resultant outcome.

A rider must be attached to the application though ie, unless the matter for judicial review is amenable to judicial review no success may be envisaged.

[26] It must be stressed that the AG is expected to act honestly and without fear and favour. However, the avenue of the person being unhappy with his decision is elsewhere and not to the court.

Conflict Of Interest

[27] Given my conclusion on the first issue, I deal with the second issue in less detail as the law is intertwined.

[28] Learned counsel for the applicant submitted that the respondent by being appointed as the 'Attorney-General' by the Yang di-Pertuan Agong pursuant to the advice of the Prime Minister, the AG is in conflict of interest to decide whether to charge or not to charge the Prime Minister on the 1MDB and its related cases.

[29] I am unable to accept the applicant's submission on this point. Article 145(3) must always be borne in mind. I agree with learned Senior Federal Counsel that art. 145(3) of the Constitution is a special provision which give only the AG the power to institute, conduct or discontinue any proceeding for an offence (other than proceedings before a Syariah Court, a native court or a court-martial)

[30] Article 145(3) gives the Attorney-General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue. (See *Long bin Samad*).

[31] Therefore, in my view, the issue of conflict of interest as contended by the applicant does not arise when the AG in this case decided not to charge the Prime Minister.

MACC's Investigation Papers

[32] The applicant contended that the decision of the AG directing the MACC to close its files upon the investigation into offences committed by the Prime Minister is *ultra vires* the AG's powers under art. 145(3) of the Federal Constitution.

[33] On this issue, the AG filed an affidavit to exhibit the press statement which shows the words he used were as follows:

Berdasarkan kepada keseluruhan fakta dan keterangan, saya sebagai Pendakwa Raya berpuasa hati bahawa tiada apa-apa kesalahan jenayah yang dilakukan oleh YAB PM berkait ketiga-tiga kertas siasatan. Pada hari

ini, kertas-kertas siasatan yang berkaitan akan dikembalikan kepada pihak SPRM dengan arahan supaya ketiga-tiga kertas siasatan tersebut ditutup (NFA/KUS).

[34] The AG explained in his affidavit that the letters referring to NFA/KUS is an abbreviation for "no further action" and "kemas untuk simpanan (tidy for keeping)" and is used as follows:

> Ini adalah arahan mengikut amalan biasa pihak pendakwaan yang diminitkan dalam kertas siasatan sekiranya tiada pendakwaan akan dibuat. Apa yang dimaksudkan dengan perkataan-perkataan "kertas siasatan ditutup (NFA/KUS)" ialah fakta dan keterangan yang dikemukakan dalam kertas siasatan tidak menzahirkan wujudnya apa-apa kesalahan jenayah.

[35] The AG in his affidavit averred that the abbreviations were normal practice of minuting an investigation paper by the prosecutor when there is no prosecution.

[36] It was pointed out by learned Senior Federal Counsel that the AG minute his instruction of "no further action" after deciding that "no offence committed by the Prime Minister" based on the existing facts and evidence in the investigation papers. The AG instructed the files to be closed since there was no further action to be taken as no offence was disclosed from the investigation papers. This is the usual practice adopted by the Attorney General's Chambers.

[37] I have carefully considered the provision of art. 145(3) of the Constitution and in my view, the instruction of NFA/KUS has nothing to do with the exercise of the AG's discretion under this article. It merely relates to the instructions commonly minute in the investigation papers after a decision not to prosecute is made as explained by learned Senior Federal Counsel.

[38] It must be emphasised that the AG stated in his affidavit that the MACC is free to reopen the file and investigate on new evidence received:

> Saya juga mendapati bahawa tiada keperluan bagi pihak SPRM menjalankan apa-apa lagi siasatan lanjut kerana saya berpuas hati bahawa siasatan yang telah dijalankan ini adalah cukup untuk saya membuat keputusan. Oleh yang demikian tiada tindakan lanjut perlu diambil dan kertas siasatan adalah untuk dikemaskan untuk simpanan. Walau bagaimanapun ini tidak bermakna pihak SPRM tidak boleh membuka semula kertas siasatan tersebut sekiranya terdapat fakta atau keterangan yang baru.

[39] I am of the view that the minute of NFA/KUS in the investigation papers does not impede the MACC to reopen investigations on new evidence. There is, in fact, no evidence adduced to show that the MACC has been impeded. There is no encroachment on the investigation powers of the MACC under the MACC Act.

[40] It must be stressed that pursuant to s. 29 of the MACC the power to carry out, investigate and report anything relating to the commission of an offence is given by the Parliament to the Commission.

[41] In this regard, s. 29(4) of the MACC Act provides as follows:

> (4) A report made under subsection (1) shall be kept secret and shall not be disclosed by any person to any person other than officers of the Commission and the Public Prosecutor until an accused person has been charged in court for an offence under this Act or any other written law in consequence of such report, unless the disclosure is made with the consent of the Public Prosecutor or an officer of the Commission of the rank of Commissioner and above.
>
> Subsection 29(4) envisages six situations whereby any report made to an officer of the SPRM relating to the commission of an offence under the SPRM Act under sub-s 29(1) can be disclosed to another person if they fall under any one of the six categories. They are as follows:
>
> (a) officers of the commission;
>
> (b) the public prosecutor;
>
> (c) when the accused person has been charged in court for an offence under the SPRM Act in consequence of such report;
>
> (d) when the accused person has been charged in court for an offence under any other written law in consequence of such report;
>
> (e) the disclosure is made with the consent of the public prosecutor; and
>
> (f) the disclosure is made with the consent of an officer of the commission of the rank of commissioner and above.

[42] On the scope of s. 29 of the MACC, learned Senior Federal Counsel has correctly stated the position of the law namely:

(i) every report on the commission of offences for which the MACC may investigate must be reduced to writing;

(ii) if after perusing over such a report, an MACC officer finds that it raised a suspicion that an offence for which the said MACC officer might investigate, then he may initiate an investigation using all the powers under the MACC Act or the Police Act;

(iii) that report and the resultant investigation is classified as SECRET unless

(a) the suspect has been charged in a court of law or;

(b) the Public Prosecutor declassified it as such or; and

(c) an officer of the Commission of the rank of Commissioner and above, declassified it as such.

[43] It must be noted that the applicant is not challenging the validity of s. 29 of the MACC Act particularly with regards to the status of the MACC papers which by operation of law is classified as secret and shall not be disclosed unless it falls under the six situations as stated by the Court of Appeal in the case of *Mohd Zulhazi Mohd Zulkafli v. Suruhanjaya Pasukan Polis Diraja Malaysia & Anor* [2014] 1 LNS 574; [2015] 2 MLJ 88.

[44] In my view, the proviso to s. 29(4) is not applicable to the facts of this present case. In *Zulkifly*'s case, the Court of Appeal held that the appellant who was charged with a disciplinary offence for accepting bribe from Alex, the appellant needed to have sight of the allegation made against him in order for him (the appellant) to prepare his defence.

[45] However, in this present case, the MACC papers which are the subject matter of the challenge, relate to the complaints against the Prime Minister and it is not against the applicant.

[46] Recently, the Federal Court in the case of *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* [2016] 3 CLJ 19; [2016] 1 MLJ 733 held that evidence of relevant facts becomes inadmissible when its reception offends *inter alia* a particular rule of law an example of which are privileged against disclosure. In this case, the relevant law is s. 29(4) of the MACC Act.

[47] I have no doubt that the applicant has no knowledge whatsoever of the facts and evidence the MACC had placed before the AG. The evidence and material which the AG considered in arriving at his decision are therefore not before this court. Therefore, neither the court nor the applicant may have access to those MACC investigation papers.

[48] With respect in my view, there is no merit in the applicant contention that the decision of the AG directing the MACC to close its files upon the investigation into offences committed by the Prime Minister is *ultra vires* the AG's powers under art. 145(3) of the Federal Constitution.

[49] On this issue, it seems to me there is no purpose for this court to grant leave just for the purpose of investigation on full *inter parte* basis as there is no arguable case in respect of the applicant's application. (*Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Berhad* [1995] 3 CLJ 627 and *Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia* [2013] 2 CLJ 1009; [2013] 2 MLJ 321 followed).

The Request For Mutual Legal Assistance

[50] On this point, learned counsel for the applicant submitted that the only consideration by the AG in the exercise of his discretion under s. 8(2) MACMA is simply whether he had reasonable grounds to believe that the request by MACC was relevant to their ongoing investigations at the material time in respect of the purported donation.

[51] In this regard, learned Senior Federal Counsel for the applicant submitted that the AG refused MACC's request on the grounds that he had found that there was no criminal offence committed by the PM.

[52] Therefore, it was submitted for the applicant that the AG has failed to apply the correct test in arriving at his decision to refuse MACC's request for mutual legal assistance.

[53] It is necessary to refer to s. 8(2) of MACMA which reads as follows:

> The AG may, if he is satisfied that there are reasonable grounds for believing that anything would be relevant to a criminal matter request the appropriate authority of a foreign state:
>
> (a) to assist in obtaining such thing; and
>
> (b) arrange for the thing to be sent to him.

[54] The AG stated in his press statement the reason why he refused the application:

> Berhubung perkara ini juga, saya berpuas hati bahawa tiada keperluan bagi Malaysia untuk membuat permintaan bantuan bersama dalam perkara jenayah (mutual legal assistance) kepada mana-mana Negara asing bagi tujuan melengkapkan siasatan yang dijalankan oleh pihak SPRM memandangkan tidak terzahir apa-apa kesalahan jenayah berhubung sumbangan dana RM2.08 billion tersebut.

[55] Based on the above statement, it is noted that the AG said that on the evidence of witnesses and supporting documents produced in the investigation papers there is no offence disclosed.

[56] In the light of the Federal Court decision in *Empayar Canggih Sdn Bhd v. Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna* (Rayuan Sivil No. 01(f) 21-09-2012(W) unreported) the AG's exercise of power under s. 8(2) MACMA is in the course of a criminal investigation and hence not reviewable by the court.

[57] Section 2 of the MACMA Act defined criminal matter in s. 8(2) of MACMA Act to mean a criminal investigation.

[58] The Federal Court in *Empayar Canggih Sdn Bhd v. Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna* held that:

> [24] … An exercise of power in the course of a criminal investigation is not open to review under O. 53 RHC. To hold otherwise, would, to our mind, be exposing the criminal investigative process of all law enforcement agencies in the country to constant judicial review which surely could not have been the intention of Parliament … In this regard, we would approve the decision on similar point made by the Kuala Lumpur High Court in *City Growth Sdn Bhd v. The Government of Malaysia* [2006] 1 MLJ 581 … The crucial question for the determination of the Court was whether the said orders of the DPP pursuant to s. 50(1) of AMLA was reviewable by way of judicial review. Raus J (as His Lordship then was) held:

A [11] From the above, it can be seen that the deputy public prosecutor's order was in pursuant to s. 50(1) of AMLA. Section 50(1) of AMLA is in the following words:

(1) Where the Public Prosecutor is satisfied on information given to him by an investigation officer that any movable property, including any
B monetary instrument or any accretion to it, which is the subject-matter of an offence under subsection 4(1) or evidence in relation to the commission of such offence, is in the possession, custody or control of a financial institution, he may, notwithstanding any other law or rule of law, after consultation with Bank Negara Malaysia, the Securities Commission or the Labuan Offshore Financial Services Authority, as the
C case may be, by order direct the financial institution not to part with, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied.

[12] Looking at the order of the deputy public prosecutor as well as the provision of s. 50(1) of AMLA, I am of the view that the order of the
D deputy public prosecutor is not reviewable under O. 53 of the RHC. To me, s. 50(1) of AMLA is part and parcel of the investigation process into an offence under s. 4(1) of AMLA. It appears that in order to facilitate the investigation into the offence of money laundering, the law has provided with the public prosecutor the power to assist the investigating officer. Clearly, s. 50(1) of AMLA was enacted to enable the public
E prosecutor or his Deputy to make an order of seizure of movable properties in the possession of the financial institutions by ordering the financial institutions not to part, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied.

The Order Of *Mandamus* To Require A Royal Commission Of Enquiry Be
F **Formed**

[59] Learned Senior Federal Counsel submitted that the relief sought by the applicant for a *mandamus* order that a Royal Commission of Inquiry be formed and convened to inquire, deliberate, and thereafter to advise the appropriate actions to be taken on the MACC investigation papers, is not
G within the competent jurisdiction for this court, since such power to form the Royal Commission of Inquiry is vested only with the Yang di-Pertuan Agong, and not with the court.

[60] It is noted that under s. 2 of the Commissions of Enquiry Act 1950, the Yang di-Pertuan Agong can set up a Commission for the purposes
H provided in the said s. 2 of the Commission Enquiry which states as follows:

2. Issue of Commissions

(1) The Yang di-Pertuan Agong may, where it appears to him to be expedient so to do, issue a Commission appointing one or more Commissioners and authorising the Commissioners to enquire into:
I

(a) the conduct of any federal officer;

(b) the conduct or management of any department of the public service of Malaysia;

(c) the conduct or management of any public institution which is not solely maintained by State funds; or

(d) any other matter in which an enquiry would, in the opinion of the Yang di-Pertuan Agong, be for the public welfare, not being:

(i) a matter involving any question relating to the Islamic religion or the Malay custom; or

(ii) in relation to Sabah or Sarawak, a matter specified in item 10 of the State List:

Provided that where any federal officer into whose conduct it is proposed to enquire, was, at the time of committing such conduct, serving in a department of the public service of a State, such commission shall only be issued with the concurrence of the State Authority.

[61] I accept the submission of learned counsel for the applicant that the decision whether to exercise or not to exercise such discretion actually vests with the Government, "because His Majesty is a constitutional monarch and in this regard, he was required by art. 40(1) of the Constitution to: act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet."

[62] However, the discretion to set up the Commission of Enquiry is exclusively within the sphere of the executive. In the light of the principles cited by the Federal Court in *Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia* [2013] 2 CLJ 1009; [2013] 2 MLJ 321, in my view, the setting up of a Commission of Enquiry involves a policy consideration by the Federal Government.

[63] The Government policies emanate after consideration of a number of technical factors which are often non-legal; and judges do not possess the necessary information and expertise to evaluate these non-legal factors and to pass judgment on the appropriateness or adequacy or a particular policy." (*Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia* followed).

[64] Based on the above reasons, in my view, the relief and the subject matter presented by the applicant with regards to the setting up of a Royal Commission, in this case involves a policy consideration by the respondent and hence non-justiciable.

[65] The jurisprudence of the court is that it is not for the court to interfere in the matter because the wisdom and policy of the Government belong to the Government. The court cannot tell the public authority how to exercise its powers (see *Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63).

Conclusion

[66] Based on the above reasons in my view, strong reasons exist for this court to dismiss the applicant's application at this preliminary stage without proceeding to the hearing of the substantive issue.

[67] As I have stated earlier, there is no purpose for this court to grant leave just for the purpose of investigation on full *inter parte* basis as there is no arguable case in respect of the applicant's application. (see *Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Berhad* [1995] 3 CLJ 627 and *Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia* [2013] 2 CLJ 1009; [2013] 2 MLJ 321 followed).

[68] In the light of the above reasons, it is not necessary for me to consider the issue of the applicant's *locus standi*.

[69] Hence encl. (1) is dismissed with no order as to costs.